IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

Nos. 430 and 434

SINCLAIR REFINING COMPANY, A CORPORATION,
Petitioner in No. 434, and
Respondent in No. 430

vs.

SAMUEL M. ATKINSON, ET AL.,
Respondents in No. 434, and
Petitioners in No. 430.

REPLY BRIEF ON BEHALF OF SINCLAIR REFINING COMPANY IN NO. 434.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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REPLY BRIEF ON BEHALF OF SINCLAIR REFINING COMPANY IN NO. 434.

I.

No-Strike, Compulsory-Arbitration Contracts Prior to the Norris-La Guardia Act, Were Uniformly Enforced by Injunctions Forbidding Strikes Which Violated Them.

Defendants do not attempt to meet the above stated proposition of our original brief (pp. 11-14), save in passing fashion at their pages 85 and 86, in which they refer to *Foss* v. *Portland Terminal Co.*, 1 Cir., 287 Fed. 33, and *Kinloch Telephone Co.* v. *Local Union No. 2*, 8 Cir., 275 Fed. 241.

Those cases do not militate against, but strengthen our proposition. The *Foss* case was one of many that arose from the railway shopmen's strike of 1922. It involved the interplay of the Transportation Act of 1920 (44 Statutes at Large 1447, 45 U. S. C. § 101, *et seq.*) and the Clayton Act. Detailed examination of the Transportation Act of 1920 is not relevant for present purposes; it is sufficient to say that it had no provision outlawing strikes, nor did it make decisions of potential "Adjustment Boards," of the "Board of Mediation and Conciliation" or of the "Railroad Labor Board" enforceable. (See President Harding's Special Message to Congress, August 18, 1922, 62 Cong. Rec. 11539.) In the *Foss* case the union had a contract with the Portland Terminal Company which *did not contain* a no-strike provision. In substance the District Court in *Foss* (283 Fed. 204) implied an undertaking not to strike into any situation in which there was a contract that called for submission of major disputes to the Transportation Act's Railroad Labor Board. It issued an injunction. The Court of Appeals for the First Circuit reversed and said, *arguendo*, that a naked contract to arbitrate, if it be assumed there had been one, would not render a strike illegal.

On the other hand, in the *Kinloch Telephone* case there was a true no-strike, no-lockout, *quid pro quo* contract, and the Court of Appeals for the Eighth Circuit directed that an injunction issue.

Thus our proposition that prior to Norris-La Guardia genuine no-strike, compulsory-arbitration clauses uniformly were enforced, is not impaired by defendants' brief and is strengthened through addition of the *Kinloch Telephone* case.

II.

Defendants Have Been Unable to Provide Any Answer to Our Contention that a Construction of Norris-LaGuardia which Would Permit Injunctive Enforcement Against Employers of Their Covenants to Arbitrate But Forbid Injunctive Enforcement Against Employees (and Their Organizations) of Their Correlative Covenant Not to Strike, Would Render the Act Unconstitutional as Denying Equal Protection of the Laws.

In our original brief (pp. 29-33) we pointed out the discrimination and denial of equal protection of law that would result if it were held that industrial employers cannot secure injunctive enforcement of a contract not to strike while employees can secure such enforcement of the correlative promise of the employer to arbitrate. Defendants' failure to answer this basic constitutional point comes, we suggest, not from choice but from inability to make satisfactory answer.

Norris-LaGuardia cannot, we respectfully submit, constitutionally be construed to permit employees to obtain injunctive enforcement of the no-strike, compulsory-arbitration contract but to deny equal remedy to employers.

III.

A Court of Equity May Enjoin Continuation of an Illegal Course of Conduct.

Defendants assert that because no strike was in progress at the time an injunction was prayed, no court has injunctive power to reach into the "indefinite future" to establish itself as the "primary control over the daily course of labor relations." Defendants' contention greatly overstates the case:

The courts below did not reach questions of this variety. They simply held that Norris-LaGuardia stood in the way of any kind of injunctive relief. Therefore, we believe defendants' contentions as to the scope of relief are not ripe for decision here. However, the following considerations may be noted.

1. Erroneous factual assertions are made at page 81 of defendants' brief that the affidavit of the president of the Local Union is "uncontroverted," that it shows that practically all of the disputes alleged in Count III have been settled through the grievance and arbitration provisions, and that the remaining elements of conflict are in the process of settlement. We regret it is our duty to state that none of those assertions are true:

The affidavit of Mr. Swanson is controverted (see our original brief, pp. 37-39).

How the various walkouts were settled or terminated is not shown by the record.

The asserted $2.19 pay grievance over which the February 13-14, 1959 walkout was staged was subsequently submitted for disposition under the grievance procedure (R. 35-36). What the other grievances (R. 37-41) really are about, cannot be ascertained unless and until there is an attempt to arbitrate them; however, they do not, on their faces, even claim that the grievants were "disciplined" as counsel now assert.

2. The count for an injunction fundamentally is based upon the allegation (which the motion to dismiss admits) that defendants had shown a continuing proclivity toward a particular course of illegal conduct. The power of a court of equity to enjoin continuance of a course of illegal conduct is clear. In the labor field especially it is clear that courts of equity have power to enjoin potential future breaches of duty once a past violation, much less a steady

pattern of it such as is admitted by the motion to dismiss here, is established. All orders of courts approving Labor Board cease and desist orders are in large part injunctions restraining future conduct.

In both *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, and in *May Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, the Court pointed out that orders of the National Labor Relations Board were essentially injunctive in character and became directly so when converted into so-called enforcement orders and should be framed according to classic principles of equitable remedies. In the *Express Publishing* case, at page 435, the Court said:

> "A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past. * * *"

and at page 436 further held:

> "The breadth of the order, *like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts*[1] *which the Board has found to have been committed by the employer in the past.* * * *" (Emphasis supplied.)

3. The contention that the complaint prays for an injunction which will establish the "primary control over the daily course of labor relations" is mere fanciful exaggeration. The only injunction which was prayed was one which would restrain defendants from aiding or participating

1. For typical cases where Courts of Appeal have exercised this power see *National Labor Relations Board* v. *Sewell Mfg. Co.*, 5 Cir., 172 F. 2d 459; *National Labor Relations Board* v. *Gerling Furniture Mfg. Co.*, 7 Cir., 103 F. 2d 663; *Pueblo Gas & Fuel Co.* v. *National Labor Relations Board*, 10 Cir., 118 F. 2d 304.

in "any strike, stoppage of work, * * * etc., at the East Chicago refinery * * * in support of, or because of, any matter or thing which is or could be the subject of a grievance under the grievance procedure of the said contract, or any extension thereof, or any other contract between the parties which contains like or similar provisions." (R. 18.) All that was prayed was a limited injunction, i. e., one that would prohibit illegal strikes over matters that properly were within the grievance procedure. This in no way would constitute "control over the daily course of labor relations."

4. The proposed duration of the injunction was not indefinite. The complaint prays only for an injunction limited to the life of the contract then in effect, or any extension thereof, or any subsequent contract between the parties having substantially identical provisions. The prayer is based upon the fact that this contract, in common with most modern collectively bargained contracts, anticipates continued relations between the parties and a continuation of the basic framework of the contract. If it be assumed, as we think is the case, that nine instances of illegal strikes in a period of some nineteen months in the life of a two-year contract, warranted the issuance of an injunction to protect the contract for the remaining five months of its stated existence, it would be a peculiar thing if promptly upon renewal or extension of the contract (as occurred) at the end of its stated two-year life, plaintiff would be required to get a new injunction to protect a new contract containing the old no-strike, compulsory-arbitration provisions.

5. Finally, if it be assumed as we contend that Norris-LaGuardia does not remove jurisdiction, it is apparent that the District Court would be governed by "traditional equitable considerations" (*Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad Co.*, 363 U. S. 528, 531) in

hioning its remedy so as to afford only proper and
ropriate relief on the particular facts as it found them
er hearing.

Respectfully submitted,

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